Supreme Court, U.S.
FILED
APR 29 1994
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No. 93-1469

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

FOXWOOD MANAGEMENT COMPANY,
CHARLES L. SOWELL and JACK C. OGG,
Defendants/Applicants/Petitioners,
v.
THE FEDERAL DEPOSIT INSURANCE CORPORATION, AS RECEIVER FOR GIBRALTAR SAVINGS ASSOCIATES and FIRST GIBRALTAR BANK, FSB,
Plaintiff/Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

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BRIEF IN OPPOSITION

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13 pp

TABLE OF CONTENTS

STATEMENT OF THE CASE 1

SUMMARY OF THE ARGUMENT 1

ARGUMENT 3

Respondent Was Not Required to Prove Commercial Reasonableness (Response to Applicants' Point Number Three) 3

Respondent Proved Every Element Necessary To Recover on the Note and Guaranties (Response to Applicants' Point Number Four) 5

CONCLUSION 10

TABLE OF AUTHORITIES

Cases	Page No.
Celotex Corp. v. Catrett, 106 S.Ct. 2548 (1986)	9
Continental National Bank of Fort Worth v. Conner, 214 S.W. 2d 928, 930-931 (Tex. 1948)	7
Foster v. Daon Corp., 713 F.2d 148, 151 (5th Cir. 1983)	8
Greathouse v. Charter National Bank, 851 S.W. 2d 173 (Tex. 1992)	3
Saver Federal S&L v. Reetz, 888 F.2d 1497, 1501 (5th Cir. 1989)	5

STATEMENT OF THE CASE

The statement of the case contained in the Petition for Writ of Certiorari filed by Foxwood Management Company, Charles L. Sowell, and Jack C. Ogg ("Applicants") is an accurate statement of the case and the proceedings in the Court of Appeals and the Federal District Court.

SUMMARY OF THE ARGUMENT

First Gibraltar's ("Respondent") Brief in Opposition to Applicants' Petition for Writ of Certiorari deals solely with Point Numbers Three and Four of Applicant's Petition. In Point Number Three, Applicants argue that the Fifth Circuit Court of Appeals erred in holding that the Respondent was not required to prove commercial reasonableness of its foreclosure. This argument is without merit. Applicants failed to file a response to Respondent's Motion for

Summary Judgment. Consequently, there is no evidence in the record to show that Respondents foreclosed on any personal property. Therefore, Respondents were not required to prove a personal property foreclosure was commercially reasonable.

In Point Number Four, Applicants argue that Respondent failed to meet its burden of proving that it was entitled to summary judgment on the note and guaranties under Rule 56 of the Federal Rules of Civil Procedure. Applicants have again failed to mention to this court that they have waived all of the arguments contained in Point Number Four by virtue of their failure to file a response to Respondent's Motion for Summary Judgment. The only question before this court is whether Respondent's summary judgment

evidence proved every element necessary to recover under the note and guaranties. Clearly, the Respondent met its burden of proof.

ARGUMENT

Respondent Was Not Required to Prove Commercial Reasonableness
(Response to Applicants' Point Number Three)

In Greathouse v. Charter National Bank, 851 S.W. 2d 173 (Tex. 1992), the Texas Supreme Court held that commercial reasonableness must be proven in all cases where the foreclosed collateral is personal property. Applicants claim that because the Deed of Trust attached to Respondent's Motion for Summary Judgment referred to certain personal property, Respondent was required to prove commercial reasonableness. However,

Applicants cannot point to any evidence in the record that would indicate that personal property was foreclosed on by Respondent. Presumably, Applicants could have introduced such evidence in their response to Applicants' Motion for Summary Judgment. However, Applicants chose not to file a response.

As pointed out by the Fifth Circuit in its opinion, appellate courts have traditionally looked skeptically at appeals from summary judgments where no defenses were raised in the summary judgment proceeding to discourage "trial by ambush." This appeal is a classic "trial by ambush." Applicants have alleged, for the first time, that personal property was foreclosed on during the foreclosure proceeding. When no

opposition is made to motion for summary judgment, the moving party is only required to make a prima facie showing of its right to judgment. Saver Federal S&L v. Reetz, 888 F.2d 1497, 1501 (5th Cir. 1989). Respondent made that prima facie showing and this "trial by ambush" should not be allowed.

Respondent Proved Every Element Necessary To Recover on the Note and Guaranties
(Response to Applicants' Point Number Four)

In their Point Number Four, Applicants argue that Respondent did not prove all of the elements necessary to recover under the note and guaranties. Applicants' arguments are so numerous that they can only be characterized as the shotgun approach to appellate review: Shoot as many pellets as possible and hope

one hits the target. What Applicants fail to recognize is that by failing to file a response to Respondent's Motion for Summary Judgment in the district court, Applicants have waived all of these arguments.

Applicants first argue that the Deed of Trust was not included in the summary judgment evidence. This is a misstatement of fact. The Deed of Trust was included as summary judgment evidence, but simply mislabeled. Consequently, all of Applicants' arguments related to the absence of the Deed of Trust are without merit.

Applicants next argue that summary judgment should not have been granted because a "companion document" was not attached to the note marked as Exhibit "A"

to Respondent's Motion for Summary Judgment. However, the language of the note attached as Exhibit "A" did not incorporate the terms of the prior note, it merely referred to it. Consequently, the prior note need not be included in the record. Continental National Bank of Fort Worth v. Conner, 214 S.W. 2d 928, 930-931 (Tex. 1948).

Applicants further argue that the Fifth Circuit erred by not requiring Respondent to offer evidence that the Applicants were personally liable on the note and guaranties. By making this argument, Applicants are asking this court to ignore the law in Texas that general partners are liable for partnership debts, and can be sued directed by third parties on partnership debts, without the

partnership being named as a party to the lawsuit. Foster v. Daon Corp., 713 F.2d 148, 151 (5th Cir. 1983). In this case, Applicants were personally liable because they were general partners in a general partnership that was the general partner in the limited partnership that was the maker of the note. There is no need for Applicants to prove that the Respondents were personally liable for signing the guaranty agreements. They are liable as a matter of law.

Applicants' final argument is that the summary judgment evidence contained in an affidavit from one of Respondent's corporate officers is improper summary judgment evidence. This argument is a classic example of "trial by ambush." The affidavit of Donna Bailey, attached to

Respondent's Motion for Summary Judgment as Exhibit "E", outlined (1) that the note and guaranty existed, (2) that the Applicants signed the note and guaranties, (3) that the Respondent legally owned and held the note and guaranties, (4) that the Applicants defaulted under the note and guaranties, and (5) that a certain balance remained due and owing under the note. Consequently, the Respondent made a prima facie showing of its right to judgment. Once Respondent made a prima facie case, the burden of proof shifted to the Applicants to rebut the prima facie case. Celotex Corp. v. Catrett, 106 S.Ct. 2548 (1986). Applicants did not meet their burden of proof. The district court was correct in granting Respondent's Motion for Summary Judgment, and the Fifth

Circuit Court of Appeals was correct in affirming the District Court's ruling.

CONCLUSION

This court should not grant the Applicants' request for a Writ of Certiorari.

WHEREFORE PREMISES CONSIDERED, Respondents pray that Applicants' Petition for Writ of Certiorari be denied.

Respectfully submitted,



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